

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

-----X
SARA TIRSCHWELL,

Appellant.

DOCKET NO.: 2020-03192

-against

TCW GROUP INC. TWC LLC,
DAVID LIPPMAN and JESS RAVICH,

AFFIDAVIT OF
ALEXANDRA COLL

Respondents.

-----X
DISTRICT OF COLUMBIA). SS.:

Alexandra Coll, being duly sworn deposes and says as follows:

1. I am president and co-founder of The Purple Campaign. I received my law degree Magna Cum Laude from Harvard Law School. I have served on the Board of Harvard Women's Law Association and as the Executive Policy Editor of the Harvard Law and Policy Review. I was the 2018 Alumni Recipient of the Harvard Women's Law Association's "Shatter the Ceiling" Award.

2. I am a member of the Bar of the District of Columbia.

3. I make this Affirmation in Support of the application of The Purple Campaign to file an amicus curiae brief in support of the Appellant, Sara Tirschwell's Reply Brief. I am authorized by the proposed amicus to submit this motion.

4. The Purple Campaign was founded because, among other things, the #MeToo movement demonstrated a widespread problem with workplace sexual harassment that existing policies, laws, institutions had largely failed to resolve. The

Purple Campaign seeks, through corporate education, collaboration, the legal system and, where indicated, legislation, to establish shared norms and expectations on sexual harassment and to ensure gender equality in the workplace, where traditional regulatory systems have failed.

5. Our founders include:

Associate Justice Ruth Bader Ginsburg
AIRBNB
Amazon
Expedia
Plenty
Uber
Viasat

6. The issues in this matter go to the heart of The Purple Campaign's mission to not only recognize the various ways that sexual harassment can manifest themselves in the workplace but to devise effective policies to deal with such harassment. I believe the attached amicus brief addresses how the various issues in this case implicate that mission.

7. The Purple Campaign respectfully requests that this Court grant their motion to file an amicus curiae brief in support of the Appellant, Sara Tirschwell's Reply Brief, which is to be heard during the May 2021 Term.



ALEXANDRA COLL

Sworn to before me this 9th
day of March 2021, by audio-
video conference Authorized by
Gov. Andrew M. Cuomo's
Executive Order 202.7 dated
March 19, 2020.


NOTARY PUBLIC

EXHIBIT B

New York County Clerk's Index No. 150777/2018

NEW YORK SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT

SARA TIRSCHWELL,

Plaintiff,

- against -

TCW GROUP INC., TCW LLC, DAVID LIPPMAN and
JESS RAVICH,

Defendants.

**BRIEF OF *AMICUS CURIAE*
THE PURPLE CAMPAIGN AND THE BLUSH PROJECT, IN SUPPORT OF
PLAINTIFF-APPELLANT**

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, 29, the undersigned certify that none of the amici curiae is a nongovernmental entity with a parent corporation or a publicly held corporation that owns 10 percent or more of its stock.

Dated: March 8, 2021

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
INTRODUCTION	2
ARGUMENT	5
A. Sexual Harassment is Widespread in the Workplace and the Rates of Sexual Harassment Have Not Significantly Decreased	5
B. Unconscious Gender Bias Permeates Male-Dominated Industries, Creating Significant Barriers to Women's Career Advancement	7
C. Historically Male-Dominated Industries Have Power Structures and Dynamics in Place Which Often Render Relationships Between Supervisors and Employees Coercive	9
D. The New York City Human Rights Law was Implemented to Offer More Expansive Protections for Those Who Are Subjected to Sexual Harassment	11
E. Prevalence of Retaliation for Reporting Workplace Misconduct is High	13
F. Employees Often Choose Not to Report and, Instead, Attempt to Cope by Avoiding or Appeasing the Harasser	14
G. The Record in This Case Contains Indicia of Gender Bias and Retaliation	15
CONCLUSION	17

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Bennett v. Health Management Systems, Inc.</i> , 92 A.D.3d 29 (1st Dep't 2011)	12
<i>Jordan v. Bates Advertising, Inc.</i> , 816 N.Y.S.2d 310 (Sup. Ct., N.Y.Co.2006)	3, 12
<i>Loeffler v. Staten Island Univ. Hosp.</i> , 582 F. 3d 268, 278 (2d Cir. 2009)	15
<i>Meritor Sav. Bank, FSB v. Vinson</i> , 477 U.S. 57, 67 (1986)	9, 11, 13
<i>Williams v. New York City Hous. Auth.</i> , 61 A.D.3d 62, 73 n.15 (1st Dep't 2009)	13
 Other Authorities	
Catalyst, <i>Women in Financial Services: Quick Take</i> (June 2020)	8
Dana Kabat-Farr & Lilia M. Cortina, <i>Sex-Based Harassment in Employment: New Insights Into Gender and Context</i> . Law and Human Behavior. (2014)	2
Dawn Lim, Steven Russolillo & Jing Yang, <i>At BlackRock, Public Firings, Overseas Probe Send Message About Office Misbehavior</i> (Feb. 2020)	11
EEOC, <i>Holistic Approach Needed to Change Workplace Culture to Prevent Harassment, Experts Tell</i> (Oct. 2018)	6
EEOC, <i>Report of the Co-Chairs of the EEOC, Select Task Force on the Study of Harassment in the Workplace</i> (June 2016)	2, 5, 6, 9, 10, 14
Heather Haddon, <i>McDonald's Fires CEO Steve Easterbrook Over Relationship With Employee</i> , The Wall Street Journal (Nov. 2020)	11
Holly Kearnl, <i>The Facts Behind the #MeToo Movement: a National Study on Sexual Harassment and Assault</i> (2018)	5
International Labour Organization, <i>Breaking Barriers: Unconscious Gender Bias in the Workplace</i> (Aug. 2017)	7

International Monetary Fund, <i>Women in Finance: Case for Closing Gaps</i> (Sept. 2018)	8
Kathleen L. McGinn & Nicole Tempest, <i>Heidi Rozen</i> , Harvard Business School Case 800-228 (Jan. 2000; Revised Apr. 2010)	7
Lean In, <i>Women in the Workplace Report</i> (2019)	5
Louise F. Fitzgerald et al., <i>Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment</i> , 51 J. Soc. Issues. 117, 119–21 (1995)	14
Michael Z. Green, <i>A New #MeToo Result: Rejecting Notions of Romantic Consent With Executives</i> , Employee Rights and Employment Policy Journal, 23 EREPJ 115 (2019)	10
New York City Human Rights Law, <i>Hearing on Int. 465-A Before the Committee on General Welfare</i> (statement of David N. Dinkins, Mayor of New York City)	3, 12
Robert Chesnut, <i>Intentional Integrity: How Smart Companies Can Lead an Ethical Revolution – and Why That's Good for All of Us</i> (2020)	9
Stephanie Riger, <i>Gender Dilemmas in Sexual Harassment: Policies and Procedures</i> , American Women in the Nineties: Today's Critical Issues 213, 219-21 (1993)	14
USMSPB, <i>Sexual Harassment in the Federal Government: An Update</i> (1988)	5
Written Testimony of Mindy E. Bergman, EEOC, <i>Workplace Harassment: Examining the Scope of the Problem and Potential Solutions, Meeting of the E.E.O.C. Select Task Force on the Study of Harassment in the Workplace</i> (June 15, 2015)	14
Regulations	
New York City Administrative Code §8-101	11

INTEREST OF *AMICUS CURIAE*

The Purple Campaign is a non-profit organization whose mission is to address workplace harassment by implementing stronger corporate policies and establishing better laws. Among other initiatives, the organization is developing a corporate certification program to recognize employers taking recommended steps to address workplace harassment in the wake of #MeToo. The Purple Campaign has partnered with some of the world's most impactful companies—including Amazon, Airbnb, Expedia, Uber, and Viasat, Inc.—in this effort to create more inclusive and harassment-free workplaces. The Purple Campaign has a particular interest in this case because it believes the judiciary needs to be cognizant of the realities of the workplace, to take note of the particular environments in which sexual harassment remains pervasive, and to give due credence to the often-subtle ways in which gender bias manifests.

The Blush Project is a non-profit organization created in 2015, which works specifically to eradicate sexual harassment in the workplace. The Blush Project is creating strategic partnerships with corporations, public policy makers, and grassroots organizations for the purpose of educating, training, and addressing sexual harassment in the workplace. It is the Blush Project's desire that this case, in particular, be heard because it sets an important precedent for the rights of women in New York and the Second Circuit.

INTRODUCTION

Women in senior management positions in the business world—such as female Portfolio Managers in the financial services industry like Plaintiff Sara Tirschwell—are scarce. The financial services industry is a notoriously male-dominated domain, an environment in which sexual harassment is more likely to occur. See EEOC, *Report of the Co-Chairs of the EEOC, Select Task Force on the Study of Harassment in the Workplace* (June 2016). Male-dominated domains occur in workplaces that have primarily male employees; where leadership is male-dominated; and/or where jobs or occupations are considered atypical for women. Dana Kabat-Farr & Lilia M. Cortina, *Sex-Based Harassment in Employment: New Insights Into Gender and Context*. Law and Human Behavior (2014).

The exceptional women like Ms. Tirschwell who manage to break through into the upper echelons of such domains find themselves in a cultural milieu where rules written by men still prevail. These rules incorporate various biases and stereotypes that have developed over decades, such as characterizations of women as emotional, dramatic, difficult, sharp elbowed, bitchy, or cranky. These often unconscious gender biases convey an attitude that women are not to be trusted or taken seriously, and when shared by other employees at a company and gone unchecked, can be detrimental to an individual's career.

Compounding the problem of unconscious gender bias is the fact that women also frequently face sexual harassment in the workplace similar to the unwelcome sexual relationship initiated by Ms. Tirschwell's immediate supervisor, Mr. Ravich. Unequal bargaining power and the "superstar" treatment given to men like Mr. Ravich often leave women in the untenable position of trying to navigate microaggressions and slights—if not more severe humiliating or degrading behaviors—in order simply to keep their jobs. And, in the relatively rare cases where

they report the discrimination and harassment, they face retaliation and backlash that can ultimately destroy their careers.

The New York City Human Rights Law (NYCHRL) was adopted with the aim of addressing these pervasive dynamics. As the then-Mayor explained at the bill signing in 1991, the law was intended to be “the most progressive in the nation” and to reaffirm “New York’s traditional leadership in civil rights.” *New York City Human Rights Law, Hearing on Int. 465-A Before the Committee on General Welfare* (statement of David N. Dinkins, Mayor of New York City). Interpreting courts have since repeatedly clarified that it is therefore to be more broadly interpreted than similarly-worded federal or state anti-discrimination provisions. *See, e.g., Jordan v. Bates Advertising, Inc.*, 816 N.Y.S.2d 310 (Sup. Ct., N.Y.Co.2006) (the NYCHRL is to “be liberally and independently construed with the aim of making it the most progressive in the nation”).

To further this goal, the law was amended in 2005 to explicitly state that it must be construed independently from both federal and New York State civil and human rights laws, including those with comparably worded provisions. *The Council Report of the Governmental Affairs Division, Committee on General Welfare, Report on Prop. Int. No. 22-A*, “To Amend the Administrative Code of the City of New York, in Relation to the Human Rights Law” at 5 (Aug. 17, 2005). The amended bill further clarified that interpretations of comparable federal and state laws may not be used to limit or restrict the provisions of this title from being construed more liberally than those laws to accomplish the purposes of the human rights law. *Id.* Indeed, footnote 8 of the 2005 amendment specifically noted:

This bill does not require a decision maker to accept any particular argument being advanced by an advocate, but underscores the need for *thoughtful, independent* consideration of whether the proposed interpretation would fulfill the uniquely broad and remedial purposes of the City’s human rights law. *Id.* (Emphasis added).

The Supreme Court of the State of New York, County of New York (Kalish, J.) failed to afford Ms. Tirschwell the protections she is entitled to under this law. The Decision and Order on Motion of the Court shunted aside as insignificant the blatantly stereotypical characterizations that were used to describe Ms. Tischwell by the men in power at TCW. In our efforts to combat workplace harassment, we advise employers to take deliberate steps to redress such unconscious gender biases through anti-harassment and implicit bias trainings and by establishing objective and fair investigation and corrective action procedures. In short, such words matter—not just because they can themselves be discriminatory, but because they also evidence an attitude of bias that permeates other behaviors and acts, creating precisely the kind of unequal workplace environment the NYCHRL intends to prohibit.

It may be that the Motion Court was thinking in terms of the requirements under federal law to state a claim regarding a pervasive and overtly hostile workplace environment—but the NYCHRL has moved beyond that. The NYCHRL asks courts to be more cognizant of behaviors women were previously asked to “grin and bear,” by being on alert for unconscious gender bias and not prejudging whether such bias was an element in actions taken by an employer.

In addition to the stereotypical characterizations referenced above, Plaintiff alleges other behavior consistent with what we frequently see in cases involving gender discrimination and workplace harassment: allegations of inappropriate romantic relationships between supervisors and their subordinates; male colleagues complaining about the Plaintiff’s supposedly aggressive conduct; and ultimately her termination just nine days after she filed her harassment complaint. As is explained further below, the Motion Court provided its own judgment on the facts and, in doing so, denied Plaintiff the protections intended by the NYCHRL.

ARGUMENT

A. Sexual Harassment is Widespread in the Workplace and the Rates of Sexual Harassment Have Not Significantly Decreased.

Sexual harassment continues to be a widespread issue in the workplace. In 2018, 38 percent of women across the United States said they had been sexually harassed in the workplace. Holly Kearn, *The Facts Behind the #MeToo Movement: a National Study on Sexual Harassment and Assault* (2018). In a similar 2019 study, two in five women said they had experienced some form of sexual harassment over the course of their career, including hearing sexist jokes, being touched in an inappropriately sexual way, or receiving unwanted attempts to have an intimate relationship. Lean In, *Women in the Workplace Report* (2019).

For some women, sexual harassment in the workplace is even more common. Social science research has shown that women who defy conventional expectations of how women should act – for example, because of their field of work or elevated position in a company – are targeted more often. *Id.* at 27. Targets of sexual harassment often face repeated sexually harassing behaviors rather than one isolated incident. According to a 1987 USMSPB survey, 54 percent of those pressured for sexual favors reported that it had occurred more than once. USMSPB, *Sexual Harassment in the Federal Government: An Update* (1988). In fact, for most women, the harassment lasted more than a week, and often lasted as long as six months. *Id.*

These trends have remained over time. During the course of fiscal year 2015, the Equal Employment Opportunity Commission (EEOC) received approximately 28,000 charges alleging harassment from employees working for private employers or state and local government employers. EEOC, *Report of the Co-Chairs of the EEOC, Select Task Force on the Study of Harassment in the Workplace* (June 2016). This is almost a full third of the approximately 90,000 charges of employment discrimination the EEOC received that year. *Id.* Of the total

number of charges received in FY2015 that alleged harassment, approximately 45 percent alleged harassment on the basis of sex. *Id.* The EEOC explained in November 2018 that “[h]its on ... [its] harassment webpage doubled since the start of the #MeToo movement one year ago.” EEOC, *Holistic Approach Needed to Change Workplace Culture to Prevent Harassment, Experts Tell* (Oct. 2018). Heightened awareness about sexual harassment led to more than a 50 percent increase in the EEOC filing suits charging sexual harassment. *Id.*

In the past few years, anywhere from 25 to 85 percent of women reported having experienced sexual harassment in the workplace. EEOC, *Report of the Co-Chairs of the EEOC, Select Task Force on the Study of Harassment in the Workplace* (June 2016). When female employees were asked if they had experienced “sexual harassment,” without that term being defined in the survey, approximately one in four reported experiencing it. *Id.* However, when female employees were asked if they had experienced one or more specific sexually-based behaviors, such as unwanted sexual attention or sexual coercion, the rate of reported harassment rose to approximately 60 percent of women. *Id.* Finally, when female employees were asked not only whether they had experienced unwanted sexual attention or sexual coercion, but also asked whether they had experienced sexist or crude/offensive behavior, the affirmative responses further increased. *Id.*

These numbers are under-inclusive when it comes to determining the prevalence of harassment in our workplaces. Approximately 90 percent of individuals who say they have experienced harassment never take formal action, such as filing a complaint or talking with a supervisor. *Id.* Common workplace-based responses by those who experience sex-based harassment include avoiding the harasser, denying or downplaying the gravity of the situation, or attempting to ignore, forget, or endure the behavior. *Id.* The least common response to

harassment is to take some formal action—either to report the harassment internally or file a formal legal complaint. *Id.* Roughly 70 percent of individuals who experienced harassment never even talked to a supervisor, manager, or union representative about the harassing conduct. *Id.* Employees who experience harassment fail to report the harassing behavior or to file a complaint because of the status of the perpetrator, they fear disbelief of their claim, inaction on their claim, blame, or social or professional retaliation. *Id.* Workplace harassment comes at a steep cost to those who endure it, and can leave lasting mental, physical, economic, and reputational harm. *Id.*

B. Unconscious Gender Bias Permeates Male-Dominated Industries, Creating Significant Barriers to Women's Career Advancement.

Unconscious gender bias remains a significant barrier to women's career advancement.

Unconscious gender bias is defined as unintentional and automatic mental associations based on gender, stemming from traditions, norms, values, culture and/or experience. International Labour Organization, *Breaking Barriers: Unconscious Gender Bias in the Workplace* (Aug. 2017) at 3. Automatic associations affect decision-making, enabling a quick assessment of an individual according to gender and gendered stereotypes. *Id.* The International Labour Organization Bureau for Employers' Activities surveyed many companies on the top barriers to women's leadership. Five of the barriers to women's leadership were related to discrimination and unconscious gender bias. *Id.* The third-most cited barrier was masculine corporate culture. *Id.* The well-known Heidi/Howard study conducted at Harvard Business School illustrates the double bind women find themselves in as a result of unconscious gender bias. In the study, professors asked students to read a case based on Heidi Rozen, a well-known venture capitalist in Silicon Valley. Kathleen L. McGinn & Nicole Tempest, *Heidi Rozen*, Harvard Business School Case 800-228 (Jan. 2000; Revised Apr. 2010). Students rated Heidi and Howard as equally competent, which was expected

as their accomplishments were identical. *Id.* However, they regarded Howard as the more “appealing” colleague and Heidi as “selfish” and “not the type of person you’d want to hire or work for.” *Id.* The research essentially demonstrated a negative correlation for women between power and success.

Wall Street and the financial services industry in which Ms. Tirschwell worked, in particular, are still heavily male-dominated industries. In many countries, women represent nearly or just over half of the financial services industry. Catalyst, *Women in Financial Services: Quick Take* (June 2020). In the United States, however, women represent only 26 percent of executive committee members in major financial services firms. *Id.* Women also account for less than two percent of financial institutions’ Chief Executive Officers and less than twenty percent of Executive Board Members. International Monetary Fund, *Women in Finance: Case for Closing Gaps* (Sept. 2018). At hedge funds, the numbers are even worse. Of the largest 50 U.S. hedge funds, only two have women as their top investment executive. Rob Copeland, *At Hedge Funds, Where are the Women?* The Wall Street Journal (Aug. 2018). Yet, these numbers contrast sharply with the supply of women with relevant degrees. According to Credit Suisse, in 2014 women represented about 30 percent of economics graduates and about 50 percent of graduates in business and the social sciences. *Id.* at 6. Thus, women leaders in finance account for a disproportionately low share of the available talent pool. This pattern is reflected in the case at hand, as Ms. Tirschwell was the only woman who named to a senior investment position at TCW since Mr. Lippman took over as CEO in 2010. It is perhaps no surprise that the number of women in asset management reporting they have experienced sexual harassment has jumped from 20% in 2014 to 32% in 2017. Financial Times, *Women in Asset Management Report*.

C. Historically Male-Dominated Industries Have Power Structures and Dynamics in Place Which Often Render Relationships Between Supervisors and Employees Coercive.

These heavily male-dominated fields also bring inherent power dynamics and imbalances between those at the top and lower-level employees. There has been an increasing public recognition that because of power imbalances in the workplace, relationships between supervisors and employees are coercive in nature and present a classic conflict of interest. A manager's personal relationship with a direct report cannot be separated from decisions about work assignments, expense approvals, promotions, performance reviews, salary, or anything else that should be based solely on the employee's performance and value to the company. Robert Chesnut, *Intentional Integrity: How Smart Companies Can Lead an Ethical Revolution – and Why That's Good for All of Us* (2020). If a boss or supervisor proposes something romantic to an employee, but the employee is not interested or sure about the advances, they often feel coerced. *Id.* This inherent dynamic presents itself because a supervisor or boss controls their subordinate's pay, rating, job assignments, and future career options. *Id.*

According to the EEOC, in workplaces with significant power disparities, particularly those with gendered power disparities, supervisors feel emboldened to exploit lower-ranking employees. EEOC, *Report of the Co-Chairs of the EEOC, Select Task Force on the Study of Harassment in the Workplace* (June 2016). In single-sex dominated workplace cultures, employees who are not of that sex may be viewed as weak or susceptible to abuse. *Id.* In the landmark 1986 Supreme Court decision *Meritor Savings Bank v. Vinson*, the plaintiff admittedly had multiple sexual encounters with her supervisor, a bank vice president executive. 477 U.S. 57, 64-67 (1986). "At first she refused, but out of what she described as a fear of losing her job she eventually agreed." *Id.* at 60. Despite agreeing that she had "intercourse with her boss some 40 or

50 times,” the plaintiff nonetheless characterized the relationship as an instance of sexual harassment. *Id.* In its holding that Title VII prohibited sexual harassment, the Court distinguished acts of volition versus unwelcome acts especially given the workplace power imbalance that was at issue. *Id.* at 58. In doing so, the Court correctly recognized that power differentials rather than welcomeness of the conduct often motivate a subordinate's acquiescence.

Companies are increasingly holding senior executives accountable for actions that do not typically fit into the narrow confines of the law regarding the quid pro quo and hostile work environment definitions. A year after the long-standing Me Too movement founded by Tarana Burke went viral, more than 200 powerful men lost their jobs amidst a renewed awareness about the sexual mistreatment of women. Michael Z. Green, *A New #MeToo Result: Rejecting Notions of Romantic Consent With Executives*, Employee Rights and Employment Policy Journal, 23 EREPJ 115 (2019). Many of these stories demonstrated how powerful men in key executive roles with their companies used their advantageous positions to target vulnerable subordinates who knew their careers could be in jeopardy depending on how they responded. *Id.* at 123.

For many years, employers merely “looked the other way” when faced with reports of policy violations that did not fit neatly into the defined bounds of sexual harassment, particularly where the allegations involved a “superstar” at the company such as Mr. Ravich (i.e. the law firm partner who brings in lucrative clients, or the renowned professor or surgeon). EEOC, *Report of the Co-Chairs of the EEOC, Select Task Force on the Study of Harassment in the Workplace* (June 2016). Psychologists have detailed how power can make an individual feel uninhibited and thus more likely to engage in inappropriate behaviors, such as sexual harassment. *Id.* The outing of high-level executives by the #MeToo movement demonstrated a need for greater institutional accountability for the conduct of those at the top of the workplace hierarchy. Major multi-

national corporations have therefore begun to increase accountability for the actions of their “superstars,” particularly when it comes to violations of relationship policies. In November 2019, McDonald’s fired its Chief Executive Officer for conduct that “violated company policy on personal conduct.” Heather Haddon, *McDonald’s Fires CEO Steve Easterbrook Over Relationship With Employee*, The Wall Street Journal (Nov. 2020). BlackRock Inc. also fired two executives in 2019 who had inappropriate romantic relationships with subordinates. Dawn Lim, Steven Russolillo & Jing Yang, *At BlackRock, Public Firings, Overseas Probe Send Message About Office Misbehavior* (Feb. 2020). The firm ousted both leaders, announcing they broke company rules in memos that were sent to Blackrock’s roughly 16,000 employees. *Id.*

D. The New York City Human Rights Law was Implemented to Offer More Expansive Protections for Those Who Are Subjected to Sexual Harassment.

Thirty years ago, the United States Supreme Court recognized claims for sexual harassment as a form of discrimination based on sex under Title VII of the Civil Rights Act of 1964. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). In the years that followed, lower courts and state legislatures filled in the legal landscape even further. As this Court is aware, in New York, employees are now protected from discrimination and harassment in the workplace under Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law (NYSHRL), and the New York City Human Rights Law (NYCHRL). Of these three laws, the NYCHRL generally offers the most expansive protections for victims.

The NYCHRL is contained in Title 8 of the New York City Administrative Code. Under §8-101, the stated policy underling the NYCHRL was to regulate and diminish the “dangers associated with the existence of groups prejudiced against one another and antagonistic to each other because of their actual or perceived differences,” including those based on gender. NYC

Administrative Code § 8-101. As a result, the Commission on Human Rights created a city agency tasked with eliminating and preventing discrimination from playing any role in actions relating to employment, among other issues. *Id.* At the bill signing ceremony for the 1991 amendments to the City's human rights law, Mayor Dinkins stated: "[t]his bill gives us a human rights law that is the most progressive in the nation, and reaffirms New York's traditional leadership in civil rights." *New York City Human Rights Law, Hearing on Int. 465-A Before the Committee on General Welfare* (statement of David N. Dinkins, Mayor of New York City).

Mayor Dinkins also explained:

There is no time in the modern civil rights era when vigorous local enforcement of anti-discrimination law has been more important. Since 1980, the federal government has been steadily marching backward on civil rights issues and it is the intention of the Council that judges interpreting the City's Human Rights Law are not bound by restrictive state and federal rulings and are to take seriously the requirement that this law be liberally and independently construed.

Id.

It has since been made clear by interpreting courts that the New York City Human Rights Law was intended to be more protective than its state and federal counterparts. In *Jordan v.*

Bates Advertising, Inc., the New York Supreme Court stated:

In enacting the more protective Human Rights Law, the New York City Council has exercised a clear policy choice which this Court is bound to honor. ***The Administrative Code's legislative history clearly contemplates that the New York City Human Rights Law be liberally and independently construed with the aim of making it the most progressive in the nation.*** Thus, the case law that has developed in interpreting both the State Human Rights Law and Title VII should merely serve as a base for the New York City Human rights Law, not its ceiling.

Jordan v. Bates Advertising, Inc., 816 N.Y.S.2d 310 (Sup. Ct., N.Y.Co.2006) (emphasis added).

Similarly, in *Bennett v. Health Management Systems, Inc.*, the Court instructed that "The existence of discrimination – a profound evil that New York City, as a matter of fundamental public policy, seeks to eliminate – demands that the court's treatment of such claims maximize

the ability to ferret out such discrimination, not create room for discriminators to avoid having to answer for their actions [. . .]” 92 A.D.3d 29 (1st Dep’t 2011).

The New York Legislature has consistently demonstrated that the NYCHRL should place less of a burden on potential victims of harassment or discrimination in the workplace than its state or federal counterparts. Under Title VII, for example, the standard for sexual harassment requires that harassment be sufficiently “severe or pervasive” to alter the conditions of the victim’s employment and create an abusive working environment. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). In 2009, the Appellate Division for the Supreme Court of New York, First Judicial Department, lowered this standard, finding that a potential victim of sexual harassment only needed to prove she was treated “less well” than other employees because of her protected status. *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 73 n.15 (1st Dep’t 2009). The Court explained that the “severe or pervasive” rule resulted in courts assigning “significantly lower importance to the right to work in an atmosphere free from discrimination” than other terms and conditions of work. *Id.* at 10. The Court continued: “The rule (and its misapplication) has routinely barred the courthouse door to women who have, in fact, been treated less well than men because of gender,” as is clearly true for the Plaintiff in this case. *Id.*

E. Prevalence of Retaliation for Reporting Workplace Misconduct is High.

Despite the #MeToo movement and changes in New York City law, many individuals – especially those with less institutional power – still remain hesitant about reporting workplace harassment because of the extreme prevalence of retaliation. According to the EEOC, *75% of those who speak out about workplace mistreatment face some form of retaliation as a result.* *Id.* Other studies have found that sexual harassment reporting is often followed by organizational indifference or trivialization of the harassment complaint as well as hostility and reprisals against

the victim. *Id.* These reactions harm the victim in terms of adverse job repercussions and psychological distress. *Id.* Mindy E. Bergman, an Associate Professor in the Department of Psychology at Texas A&M University, noted:

It is actually *unreasonable* for employees to report harassment to their companies because minimization and retaliation were together about as common as remedies and created further damage to people who had already been harassed. Further, because remediating the situation did not make the person whole – that is, did not overcome the damage caused by the harassment – and helpful vs. hurtful responses were each found about 50% of the time, reporting is a gamble that is not worth taking in terms of individual well-being.

Written Testimony of Mindy E. Bergman, EEOC, Workplace Harassment: Examining the Scope of the Problem and Potential Solutions, Meeting of the E.E.O.C. Select Task Force on the Study of Harassment in the Workplace (June 15, 2015).

F. Employees Often Choose Not to Report and, Instead, Attempt to Cope by Avoiding or Appeasing the Harasser.

Partly because of the prevalence of retaliation, most employees who suffer harassment never file a formal complaint. According to the EEOC report, “Anywhere from 87% to 94% of individuals did not file a formal complaint.” EEOC, *Report of the Co-Chairs of the EEOC, Select Task Force on the Study of Harassment in the Workplace* (June 2016). Social science evidence shows that women in particular often choose not to report either right away or ever, and instead attempt to cope by avoiding or appeasing the harasser or by pretending that the harassment is not happening. Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. Soc. Issues. 117, 119–21 (1995). Other research has demonstrated that women are much more likely to feel comfortable using informal means to resolve sexual harassment issues, because formal means of dispute resolution tend to be inconsistent with the manner in which they view conflict resolution. Stephanie Riger, *Gender Dilemmas in Sexual Harassment: Policies and Procedures*, American Women in the Nineties: Today's Critical Issues 213, 219-21 (1993). In particular, women who

have been sexually harassed have expressed that their primary objective is to stop the harassing behavior and preserve the relationship between the parties, rather than to punish the harasser. *Id.* at 219-21. These objectives are more likely to be accomplished by informal, rather than formal, means of dispute resolution.

G. The Record in This Case Contains Indicia of Gender Bias and Retaliation.

As Plaintiff has correctly noted, retaliation claims under the NYCHRL are reviewed “independently from and ‘more liberally’ than” federal law claims. *Loeffler v. Staten Island Univ. Hosp.*, 582 F. 3d 268, 278 (2d Cir. 2009). In its decision the Motion Court determined that there was *no evidence* that activity directed at Ms. Tirschwell—either prior to her termination, or after—was gender-based, and that the termination was instead simply “the culmination of continuous progressive discipline.” (R.42.) Based on our experience combatting sexual harassment and gender discrimination in the workplace, we believe the Court overlooked critical evidence in the record that indicates that Ms. Tirschwell was treated adversely precisely because she was a woman who did not fit into the male-dominated culture at TWC. This includes, *inter alia*, allegations that:

1. She terminated an unwelcome sexual relationship with her supervisor and subsequently found her job became more difficult to perform because of a lack of support. Specifically, Mr. Ravich ceased intervening on her behalf as she continued to have difficulty getting backroom support. Pl. [’s] Mem. In Opp’n to Def. Ravich [’s] Mot. for Summ. J. at 6. Mr. Ravich also directed marketing efforts to cease for Ms. Tirschwell’s Fund, limited Ms. Tirschwell’s trading authority, held secret meetings with her team while specifically excluding her, and imposed other restrictions on the Fund in violation of the terms of the private placement memorandum. *Id.*

2. She was repeatedly described in negative stereotypical terms used to describe a female who men find too demanding. Mr. Lippman frequently referred to Ms. Tirschwell as “bitchy,” “cranky,” and “sharp-elbowed.” Pl. [’s] Mem. In Opp’n to Def. TCW [’s] Mot. for Summ. J. at 1. As one of the only females in TCW’s male-dominated culture, Ms. Tirschwell also endured repeated comments from her male colleagues stating she was “difficult,” had a “very strong sense of entitlement,” and was “too emotional” and “dramatic.” *Id.*

3. The Human Resources Director, Ms. Marzano, testified that she readily accepted the complaints about Plaintiff because she saw no reason why the male subordinates would lie. Ms. Marzano admitted she never asked Ms. Tirschwell for her side of the story, because she “didn’t feel it was necessary.” Pl. [’s] Mem. In Opp’n to Def. TCW [’s] Mot. for Summ. J. at 3. Yet, Ms. Marzano could not recall another instance where she did not give the target an opportunity to be heard. *Id.*

4. Ms. Jackson, TCW’s General Counsel, testified that she was dubious of the validity of Plaintiff’s complaint of harassment from the outset because she did not understand why Plaintiff would have gone back to her supervisor’s apartment if the sex had occurred or been unwelcome. Pl. [’s] Mem. In Opp’n to Def. TCW [’s] Mot. for Summ. J. at 5. We note that TCW points to the fact that the Human Resources Director and General Counsel are both female, but the insidious nature of unconscious gender bias is that it can be exhibited equally by people of all genders and gender identities unless deliberate steps are taken to address it.

Based on our experience addressing workplace harassment and retaliation, we also believe the Court overlooked critical evidence in the record that indicates that Ms. Tirschwell was retaliated against for reporting the misconduct, such as:

1. Ms. Tirschwell's December 14, 2017 termination occurred just nine days after she filed her harassment complaint. Def. TCW ['s] Mot. for Summ. J. at 1.
2. A few hours after Ms. Tirschwell spoke with Ms. Jackson and Ms. Marzano about her HR complaint, Ms. Tirschwell went to look for one of her team members in a conference room and was shocked and appalled to find her entire investment team and Ms. Jackson, Ms. Marzano, and Mr. Ashiru seated around the table. Pl. ['s] Mem. In Opp'n to Def. TCW ['s] Mot. for Summ. J. at 5-6. Mr. Lippman proceeded to humiliate Ms. Tirschwell by blocking her from entering the conference room. *Id.* at 6.
3. TWC failed to conduct an investigation before it terminated Ms. Tirschwell. Pl. ['s] Mem. In Opp'n to Def. TCW ['s] Mot. for Summ. J. at 12. Instead, they took Mr. Ravich at face value without even commencing an investigation, and even promoted him to the Board of Directors. *Id.* at 5. Only after Ms. Tirschwell's termination on December 15, did they finally hire an investigator. *Id.*

CONCLUSION

Women have for decades been subjected to workplace harassment and unconscious gender bias that together have created near-insurmountable hurdles to ascension in their careers. This is particularly true in cases like this, where Plaintiff was breaking ground in her role as a Portfolio Manager in the financial services industry—a sector that to this day remains heavily male-dominated. While most states have only recently begun to implement legal changes aimed at protecting women from unfair discrimination in the workplace, New York has for decades been a leader in this space—as evidenced by the broad interpretation courts have given the NYCHRL as the “most progressive in the nation.” By denying Plaintiff the right to have her

claims heard by a jury, the Motion Court failed to afford her the critical protections she is entitled to under New York Law.

Respectfully submitted,

/s/ Ally Coll

Ally Coll
Shea Holman
THE PURPLE CAMPAIGN
P.O. Box 5783
Washington D.C. 20016

/s/ M. Reese Everson

M. Reese Everson
THE BLUSH PROJECT FOUNDATION
875 10th ST NW
Washington D.C. 20001